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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 869

SAMUEL ASARO,
PETITIONER,

v.

CARLO PARISI,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Samuel Asaro, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit (hereto appended and marked Appendix A, *infra*) affirming the judgment of the United States District Court for the District of Massachusetts (hereto appended and marked Appendix B, *infra*).

I.
Opinion Below

The opinion of the Court of Appeals for the First Circuit is reported in 297 F.2d 859. This opinion is hereto appended and marked Appendix C, *infra*.

II.
Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit, here sought to be reviewed, was entered on January 16, 1962 (Appendix A).

The jurisdiction of this Court to review by writ of certiorari the judgment complained of is conferred by 28 U.S.C.A. Sections 1254 (1) and 2101 (c).

No motion for rehearing was sought in the Court of Appeals.

III.
Questions Presented

Whether, in a seaman's case for personal injuries, the defendant shipowner may shift the duty of making inspection of the ship and of keeping himself informed of defective appliances, to the injured seaman so as to charge the injured seaman with contributory negligence for failure to inform the shipowner of defects, there being no showing that the seaman had been given the duty to inspect the defective appliance.

Whether, in a seaman's case for personal injuries, the injured seaman may be charged with contributory negligence when, upon orders from the mate, the seaman having used a defective appliance resulting in the injuries, the de-

fendant did not have knowledge, actual or constructive of the defective condition of the appliance.

In a seaman's case for personal injuries, the seaman having been injured while using a defective appliance pursuant to the orders of the mate, there being no showing that a safer appliance was available, whether the seaman can be charged with contributory negligence.

In a seaman's case for personal injuries where there was a verdict for the injured seaman but the verdict was reduced by 75% for contributory negligence, when the trial court's charge on the issue of contributory negligence is an incorrect statement of the applicable law, whether this incorrect statement may be condoned by the fact that all prior portions of the charge were proper and correct, even though the incorrect portion occurred on the very last reference by the trial judge to the issue of contributory negligence.

IV.

Reasons Relied Upon for the Allowance of the Writ

The decision of the court below would effect a substantial change in the basic and traditional admiralty and maritime law, as it is in direct conflict with many decisions of this Honorable Court, including *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 4 L.Ed. 2d. 941; *The Osceola*, 189 U.S. 158; *Mahnich* v. *Southern S. S. Co.*, 321 U.S. 96; *Carlisle Packing Co.* v. *Sandanger*, 259 U.S. 255 and *Petterson* v. *Alaska S. S. Co.*, 347 U.S. 396.

The decision of the court below would tend to permit a non-uniformity of judgments as a consequence of affirming the district court's judgment while at the same time appearing to agree that the portion of the charge objected to was contrary to the present state of the admiralty and maritime law.

The decision of the court below would seriously jeopard-

ize and curtail the rights of seamen and could effect a change in the relationship between seamen and shipowners. If allowed to stand, the opinion of the Court of Appeals could be the basis for subsequent incorrect statements of the applicable law on the issue of contributory negligence, leading to confusion and non-uniformity of judgments.

V.
Statement of the Case

This petition involves the rights of seamen injured in the course of their employment and specifically relates to the issue of contributory negligence when the seaman is injured while acting in obedience to orders.

The petitioner's Complaint was in three counts, the first count based on negligence under the Jones Act, 46 U.S.C.A. 688 (Appendix D), the second count based on unseaworthiness under the General Admiralty and Maritime Law, and the third count being for maintenance and cure. The case was tried to a jury which returned a verdict for the petitioner on Count I and also found 75% contributory negligence and a verdict for the respondent on Count II. The court ordered a verdict for the petitioner on Count III. In its verdict, the jury answered special questions propounded by the trial judge, the answers being to the effect that they found that there was negligence and proximate cause resulting in damage to the petitioner, that there was unseaworthiness but no proximate cause thereunder connected with the damages sustained by the petitioner; and they also found that there was contributory negligence in the amount of 75%, as a result of which the court reduced the damages by that proportion.

The petitioner appealed (inter alia) from the jury's verdict on the finding of contributory negligence, his appeal being predicated on the failure of the trial court to instruct

the jury correctly on the issue of contributory negligence, where the evidence showed that the petitioner was injured by a defective appliance that he was using pursuant to a specific order of the mate.

The petitioner's action was commenced by Complaint in the United States District Court for the District of Massachusetts on August 16, 1957. The evidence showed that the petitioner was a member of the crew of the respondent's fishing vessel, ST. ANTHONY. On April 27, 1956, while the ST. ANTHONY was in navigable waters in Gloucester Harbor, the crew was working on the vessel and the adjacent dock, getting the vessel ready to go out on her next fishing trip. The petitioner was cook and deckhand on the vessel and had been for approximately four months. The evidence was to the effect that the vessel's net, having been torn up on a previous trip, had been mended by crew members on the dock and was about to be hoisted aboard again for further use on the trip which was about to begin. (R.A. p. 13) The vessel was lying with her starboard side to the wharf. The petitioner was ordered by the mate to go to the port drumhead of the winch, and there to use a jillsen, so called, (R.A. p. 13) for the purpose of hoisting the net back aboard. A jillsen is a steel wire about ¾" in diameter, about 100 feet long and is used for some hoisting purposes. It runs from the winch, amidships, aloft to a block attached to the foremast near its top then down to the deck where the opposite end has a hook attached for use in hoisting gear or other objects. One or more crewmembers on the dock placed the hook in a strap which was around the rolled-up net, and then signalled the petitioner to go ahead on the jillsen so as to get the net off the dock and onto the boat. (R.A. p. 14)

Having been ordered by the mate to do this, (R.A. p. 13) and having received a signal from another crew member to go ahead, the petitioner then took a series of turns, approximately four, on the wire jillsen around the port drum-

head of the winch. (R.A. p. 15). There were many steel splinters or spurs in the wire jillsen which was old and worn (R.A. pp. 13, 17) and these splinters had been present since the petitioner joined the vessel the previous January. As he took his turns and drew the end of the jillsen toward him, hand over hand, a strain came on the jillsen and the net rose off the dock, into the air and then swung over the boat so that it was suspended over the deck, from a point near the top of the foremast, to where the jillsen wire ran through a single-sheaved block. At this point in the operation, the petitioner's evidence indicated that as he was about to lower the net onto the deck, he felt one or more spurs or steel splinters from the jillsen enter his right hand. (R.A. p. 15) He instinctively pulled that hand way, retaining his grip on the jillsen with his left hand. (R.A. p. 16) At that same instant, the turns around the drumhead which had provided him with mechanical advantage enabling him to hold the heavy net and link chain attachments, weighing an estimated 1,000 to 2,000 pounds, in the air, started to come off the drumhead, as a result of his inability to keep sufficient strain on the jillsen with one hand. (R.A. p. 16)

At this time the petitioner's evidence shows that there were two men, the mate Vadala and Bammarito, standing on the deck in the general area underneath the net (R.A. pp. 15, 16, 31, 50) and that it was the duty of these men to be there and wait until the net was lowered to them so that they could move it into the appropriate position on the deck of the vessel. (R.A. pp. 33, 34) The testimony of the respondent, Parisi, was to the effect that the men had to be within arm's reach so as to grasp it as it was lowered to them. (R.A. p. 49)

Being aware that if the net came down suddenly it would, in all likelihood, cause serious injury to one or both of the men beneath it on the deck, (R.A. p. 16), the petitioner attempted again to grasp the jillsen with his right hand in

order to slow down the descent of the net. He did, in fact, slow down its descent sufficiently so that the two men underneath it were able to run to safety. (R.A. p. 32) As he tried to hold the jillsen, and no longer having the advantage of the turns around the drumhead, he was only able to slow it down so that the jillsen wire was running through both his clenched hands (R.A. p. 16) until it reached a point where the end of the wire is spliced to a "tail rope", so called. This splice was not taped so that there were steel ends sticking out of it in the spliced area and when the steel ends of the splice and the splice itself struck his hands, the jillsen stopped going through his clenched hands and he was pulled up into the air and catapulted forward across the deck, so that he was deposited near the hatch, striking against an iron bar that is near the hatch. (R.A. pp. 16, 17)

The petitioner was in a semi-conscious condition, and an ambulance was summoned and he was taken to the Addison Gilbert Hospital in Gloucester. There it was found that he had a ruptured spleen and damage to the nerves and tissues in his back and neck, as well as a fractured rib and multiple lacerations, contusions and abrasions on various parts of his body.

Liability was based upon the unsafe condition of the jillsen and the fact that the petitioner had been ordered to use the jillsen.

All of the foregoing sequence of events detailing the happening of the accident occurred within a period of a second or two, and at first when he re-grasped the jillsen with his right hand, the petitioner's intention was to slow down the descending net so that the men could escape to safety. He later found, when the spliced area struck his hand, that he was unable to let go fast enough to avoid being pulled into the air. (R.A. pp. 16, 18, 19)

In the course of the trial of this case, there was testimony by the petitioner relating to the aforementioned facts. There

was testimony by a crew member, Frontiero, corroborating the happening of the accident and the fact that the mate Vadala and Bammarito were standing on the deck in the general area where the net was to be lowered. Bammarito himself testified that he was standing on the deck in that area and that that was the usual place for men to stand at the time this operation was being done, stating that there was no other place for them to stand to do it. (R.A. pp. 31, 33) a fact to which the petitioner also testified. (R.A. p. 50)

The evidence offered by the respondent relating to liability came entirely from the testimony of the respondent Parisi, who was himself the captain of the vessel. Parisi testified that he was not present at the time the accident occurred but arrived within minutes thereafter and that he assisted in the petitioner's removal to the hospital. Parisi testified that there was a custom and practice for a man on the deck that "the man stands aside until the net is swung inboard". (R.A. p. 47) and also testified that when the net comes down, the men have to be close enough to it to reach it. (R.A. p. 49)

In his charge to the jury, the trial judge stated (R.A. p. 51):

> "... You are also instructed that you may not find that the plaintiff was contributorily negligent himself if you find he was ordered by his superiors to use a gilson which was defective or unsafe or inadequate and in using the gilson he was merely following the orders of his superiors, unless you find that his superiors did not know of the defective condition or in the exercise of reasonable care would not have known of the defective (26) condition and you find that the plaintiff in the exercise of due care should have told his superiors about it."

This portion of the charge was objected to by counsel for the petitioner on the ground that there is no duty on the part of the petitioner that is properly carried by that charge.

The petitioner appealed the verdict of the jury to the Court of Appeals for the First Circuit (R.A. p. 64). The Court of Appeals held that the district judge had not committed error and affirmed the judgment of the district court (R.A. p. 134).

The petitioner submits that the court below has erroneously affirmed the judgment of the district court. The effect of this portion of the court's charge is to shift the burden of making inspection and keeping the shipowner informed of defective appliances and equipment upon the seaman-petitioner.

VI.
Argument

That portion of the trial judge's charge that is the basis for the objection of the petitioner's counsel (R.A. p. 51, 52, 106, 107) and for this petition came almost at the very conclusion of the charge relating to liability and contributory negligence. The trial judge had set forth the law in very objective and accurate fashion until this point was reached. Coming as it did, it had the emphasis of being the last thing said on the subject of contributory negligence and could only have confused and muddled the thinking of the jury on that issue.

A reading and re-reading of that paragraph today is still confusing to the reader as to its meaning.

It is clear that the words "... you are instructed that you may not find that the plaintiff was contributorily negligent himself if you find he was ordered by his superiors to use a gilson which was defective or unsafe or inadequate and in using the gilson he was merely following the orders

of his superiors . . .", form an accurate, correct and proper charge consistent with previous portions of the trial judge's charge. But when he then added the words" . . . *unless you find that his superiors did not know of the defective condition or in the exercise of reasonable care would not have known of the defective condition . . .*", (italics added) he was in so doing, charging the jury contrary to the ruling in the Mitchell case and all prior cases upon which the holding in which the Mitchell case is predicated. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 4 L.Ed. 2nd 941; *Seas Shipping Co. v. Sieracki*, 66 S.Ct. 872, 328 U.S. 89, 90 L.Ed. 1099, rehearing denied 66 S.Ct. 1116, 328 U.S. 878, 90 L.Ed. 1646.

By these added words, the trial judge has erroneously intruded the element of notice which is not a proper element in this case. This is clearly an improper charge where unseaworthiness is an issue. Then he went on and said in the same sentence" . . . *and you find that the plaintiff in the exercise of due care should have told his superiors about it.*" (italics added)

The effect of this portion of the court's charge is to shift the burden of making inspection and keeping the shipowner informed of defective appliances and equipment upon the seaman-petitioner.

This is wholly contrary to the oft-repeated statements of the U.S. Supreme Court that the defendant shipowner is under an absolute non-delegable duty to see to it that the appliances aboard his ship are in safe working order. This non-delegable duty is something he can not shift to the seaman, to whom he owes the very duty of furnishing safe and proper appliances, and there was no evidence that the petitioner had any specific duties of inspection.

Mitchell v. Trawler Racer, Inc., 265 F(2d) 426, 362 U.S. 539, 4 L.Ed. 2d 941.

By the charge given to the jury in this case, the contributory negligence for which the jury held the petitioner responsible, was, under this portion of the charge, improper and erroneous. The shipowner's non-delegable duty to furnish proper appliances carries with it the obligation to inspect to ascertain the condition of the appliances aboard his ship and he may not delegate it to the very person to whom he owes the duty of furnishing a seaworthy vessel and a safe place to work. If he were permitted to do so, the shipowner's negligence would be capable of changing its elusive and shadowy form and could become, as indeed was permitted to occur in the instant case, the seaman's contributory negligence.

This, if permitted, would make a mockery of the duty owed by the shipowner to the seaman.

The obligation of furnishing a safe place to work with safe and proper appliances is an obligation the shipowner can not delegate or contract away as to any workman within the scope of the policy to whom the duty of protection is owed.

Seas Shipping Co. v. *Sieracki*, Pa. 1946, 66 S.Ct. 872, 328 U.S. 85, 90 L.Ed. 1099, rehearing denied 66 S.Ct. 1116, 328 U.S. 878, 90 L.Ed. 1646.

Bach v. *U. S.*, D.C.N.Y. 1954, 122 F. Supp. 25, affirmed in part and reversed on the grounds 220 F.2d 165.

Cleveland-Cliffs Iron Co. v. *Martini*, C.C.A. Ohio 1938, 96 F.2d 632, certiorari denied 59 S.Ct. 65, 305 U.S. 605, 83 L.Ed. 384.

Wychgel v. *States S. S. Co.*, 1931, 296 P. 863, 135 Or. 475, certiorari denied 52 S.Ct. 11, 284 U.S. 625, 76 L.Ed. 533.

In the opinion of the Court of Appeals in the instant case, Chief Judge Woodbury stated: (R.A. p. 128), "*In vacuo* this instruction might, as the appellant contends, be mis-

understood as informing the jury, contrary to the rule in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960), that a seaman is under some sort of duty to discover and report unseaworthy conditions on his vessel and for breach of that duty is barred from recovery." Having recognized that this charge contravened the ruling in the Mitchell case, Chief Judge Woodbury then went on to declare (R.A. p. 129) that as prior portions of the charge were without error and that as the trial judge had correctly charged on all other aspects of the law relating to the case, ". . . we do not think the instruction reasonably could or would have been so misunderstood . . ."

The petitioner submits that, coming as it did near the very end of the entire charge, the erroneous instruction being the last statement of the trial judge on the issue of contributory negligence, the jury was left with an improper statement of the law to be applied to the facts, as well as leaving the jury in a muddled state insofar as its understanding of the law was concerned. One who reads that paragraph has difficulty in understanding it after several readings. How much more difficult was the task of the jury, apprehending it only orally from the lips of the trial judge. The confusion of the jury, caused, the petitioner submits, by this confused and erroneous charge, may be further indicated by the peculiar and clearly inconsistent verdict it returned when it found for the plaintiff on the negligence count, finding in answer to specific questions that there was negligence on the part of the defendant and that the defendant's negligence was causally related to the damages sustained by the petitioner, and then, in Count II for unseaworthiness, found that there was unseaworthiness but that the unseaworthy condition was not causally related to the damages. Since the plaintiff, in his evidence, limited the evidence relating to unseaworthiness to that resulting from the faulty or inadequate jillson, and since this was also the basis of the

claim for negligence, one is at a loss to understand the failure to find the causal relationship between the unseaworthy condition and the damages in the count for unseaworthiness. This is an indication of the confusion of the jury which, the petitioner submits, was brought about in large measure by the confusion in that portion of the charge which the petitioner claims to have been error. Where a portion of the charge to the jury has befogged and muddled an issue, there may well be the ground for a reversal and a new trial. *U.S. v. Christiansen*, 298 F.2d 651 (1962, 2 C.A.).

In the opinion of the Court of Appeals in the instant case, Chief Judge Woodbury cites *The Julia Fowler*, 49 F. 277 (D.C.S.D. N.Y., 1892). In *The Julia Fowler*, that learned trial judge found that a seaman had been contributorily negligent when, under orders, he knowingly used a defectively spliced rope which broke, causing him to fall. The trial judge there said that the men "would have been justified in demanding another rope . . . but they continued to work without objection. Nor can I find that if a proper rope or readjustment had been asked by them, it would not have been allowed. I do not see how I can hold this to be less than acquiescence by them in the wrongful act of the mate, such as to charge the men also with negligence or want of reasonable care." There are two matters the petitioner wishes to point upon the holding in *The Julia Fowler*. First, the trial judge there uses the word "acquiescence" which he equates with contributory negligence. Acquiescence, however, seems to be more appropriately equated with assumption of the risk and the use of the word acquiescence in the context employed in *The Julia Fowler* appears to be one of those instances described by Mr. Justice Frankfurter in his concurring opinion in the case of *Tiller v. Atlantic Coast Line R.R. Co.*, 65 S.Ct. 444, 452, 318 U.S. 54, 68, wherein Mr. Justice Frankfurter stated:

"The phrase 'assumption of risk' is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas." A seaman who is under orders has no alternative but to obey and when, as in the instant case, the mate ordered the petitioner to use the appliance which was defective, the petitioner had no choice but to obey and suffer the harm that did ultimately befall him. But this was not assumption of the risk, nor was there acquiescence in the risk; it was obedience to orders, which is demanded of seamen.

Moreover, in *The Julia Fowler*, the trial judge's opinion contains the words "nor can I find that, if a proper rope or readjustment had been asked by them, it would not have been allowed . . .", and this is quoted by Chief Judge Woodbury in his opinion in the instant case. It is respectfully submitted that the total absence in the record of any reference to an available alternative appliance is not the problem or responsibility of the petitioner. If in fact there had been an alternative appliance available subject to use and offered by the mate, since this goes to the issue of contributory negligence and as the burden of proof on the issue of contributory negligence rests with the respondent, the absence of evidence of an alternate, more adequate appliance is therefore an absence of evidence of contributory negligence. The absence of such evidence can not be used against the petitioner, by such negative language as "when for all that appeared, a sound line would have been supplied had the seaman asked the mate for one" *The Julia Fowler*. The mate, representing the shipowner, was under a duty to furnish an adequate appliance. The seaman was under a duty

to obey the orders of the mate. In the absence of the mate's suggesting the use of an alternative appliance, it is pure supposition and an improper shifting of the legal burden as well as the burden of proof to assume that had the seaman asked for a new line he would have received one.

It is not inappropriate for the petitioner to point out that in the portion of the charge complained of, the trial judge was not saying that knowledge of the defective appliance by the petitioner and its subsequent use by him constituted contributory negligence; the action on the part of the petitioner in using a known defective appliance is not contributory negligence as stated in the case of *Cricket S.S. Co.* v. *Parry*, 263 F. 523 (2 C.C.A. 1920) cert. den'd. 40 Su. Ct. 345, 252 U.S. 580, 64 L.Ed. 726. But the trial judge in the instant case went even further than what was unsuccessfully attempted in the *Parry* case. He imposed upon the petitioner-seaman the duty of informing the shipowner concerning the defective condition of the appliance. It is respectfully submitted by the petitioner that the seaman-crew member is under no such duty unless it is clearly set forth in the evidence that this is one of his duties, and in the instant case there is no evidence to this effect in the record.

VII.
Conclusion

Wherefore, the petitioner respectfully submits that the ruling of the court below is contrary to the standards of law as laid down by clear pronouncements in the decisions of this Honorable Court and that certiorari should be granted.

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Attorney for Petitioner.

Appendix A

JUDGMENT
January 16, 1962

This cause came on to be heard on appeal from the United States District Court of the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(s) ROGER A. STINCHFIELD
Clerk.

Appendix B

JUDGMENT
February 14, 1961

GIGNOUX x. D. J.
(By assignment)

This case came on for trial before the Court and a jury on counts 1 and 2 of plaintiff's complaint, the Court reserving for its own determination the issues as to count 3.

After the issues in counts 1 and 2 were duly tried, and the jury having returned a special verdict for the plaintiff, Samuel Asaro on said counts, the Court orders judgment for the plaintiff, Samuel Asaro, against the defendant Carlo Parisi, to be entered on counts 1 and 2 in the amount of $3,000;

And the Court further orders that the following judgment enter in accordance with its findings on the issues in count 3:

> Judgment for the plaintiff, Samule Asaro, against defendant Carlo Parisi, on count 3, in the amount of $2,163.93, plus interest of 6% from August 16, 1957, the date of the complaint to the present date, in the amount of $453.70, a total on count 3 of $2,617.63; and for plaintiff's costs taxed at $

By the Court,

(s) FRANCES R. FOLEY
Deputy Clerk

(s) EDWARD T. GIGNOUX
United States District Judge
Judgment entered February 14, 1961

Appendix C

OPINION OF THE COURT
January 16, 1962

WOODBURY, *Chief Judge*. The plaintiff-appellant, a seaman and fisherman, was injured in the course of his employment as a member of the crew of the defendant-appellee's fishing vessel when he undertook to hoist a heavy net from a wharf in Gloucester, Massachusetts, at which his vessel was moored, to the deck by means of what is called a gilson.[1] He filed a complaint in the court below in three counts, one for negligence under the Jones Act, a second for unseaworthiness under the general maritime law and a third for maintenance and cure. The first two counts were tried by jury which by direction returned a special verdict. In answer to specific questions submitted by the court without objection, the jury found that the defendant had been negligent and that his negligence was a proximate cause of the plaintiff's injuries, that the defendant's vessel was unseaworthy but that its unseaworthiness was non-causal, that the plaintiff's own negligence had contributed to his injuries to the extent of 75% and that his total damages amounted to $12,000. On this verdict the court below entered judgment for the plaintiff on the first count for $3,000 and judgment for the defendant on the second count. It also entered a judgment for the plaintiff on the third count for maintenance and cure.

[1] The word is not found in Webster's New International Dictionary, Second Edition, but is apparently in common use by fishermen. Its spelling seems to vary from "gilson" to "jillsen." It is a steel wire cable about ¾" in diameter and about 100' long used for hoisting purposes. It runs from the winch mounted amidships on fishing vessels to a block attached near the top of the foremast and then down to the deck. At that end a hook is attached for use in hoisting fishing gear and other objects.

This appeal by the plaintiff below is directed at the above judgment only insofar as counts one and two are concerned. That is to say, he challenges the propriety of the jury's verdict for the defendant on count two and its finding of his 75% contributory negligence on count one. His contentions are that the court below committed reversible error in its charge and in the admission of certain evidence.

There is no substantial dispute over the basic evidentiary facts. Stated most favorably to the plaintiff they are as follows: The vessel's net having been damaged on a previous trip and mended by crew members on the wharf, the plaintiff was ordered by the mate to participate in hoisting it back on board in preparation for the next trip. He was told to go to the port drumhead of the winch and use the gilson for that purpose. Crew members on the wharf placed the hook on the end of the gilson through a strap around the rolled-up net and passed the word to hoist the net on board. Upon receipt of a signal to go ahead from another crew member, the plaintiff took about four turns of the gilson around the port drumhead and taking in the slack hoisted the net from the wharf and swung it over the forward deck, where two crew members stood to receive it and guide it into position for stowing along the rail. At this juncture a steel spur or splinter on the gilson, which had been in use for some time and was worn, pierced the plaintiff's right hand causing him instinctively to let go with that hand. He was unable to keep sufficient strain on the gilson with only his left hand and as a result the turns taken around the drumhead began to jump off. Fearing for the safety of the men on the fore deck, who he said were standing under the net, the plaintiff grabbed the gilson again with his right hand in the endeavor, at least to slow the descent of the net but, without having any mechanical advantage from the winch he could

not do so, for the net weighed between one and two thousand pounds. The gilson ran through the plaintiff's clenched hands until his left hand was caught on the steel ends of an untaped splice and he was lifted and flung forward onto the fore deck and against an iron bar near the hatch.

The plaintiff-appellant contends that on this evidence he cannot as a matter of law be charged with contributory negligence because it conclusively establishes that he acted in an emergency not created by his own antecedent negligence in an attempt to rescue the two crew members on the fore deck from their peril from the falling net. This contention rests upon a misunderstanding of the emergency doctrine.

The plaintiff's freedom from antecedent negligence is not altogether clear. It could be found that he knew the men on the fore deck were standing in a place of danger when he started to hoist the net, and there is no evidence that he shouted to them to get out from under. However, even if we assume that the emergency was not created by the plaintiff's fault, it would not follow as a matter of law that the plaintiff could not be charged with subsequent negligence. The fact that one acts in an emergency he has not caused, even to save another from danger, is only a factor or circumstance to be considered in determining the care, it being quite naturally assumed that the ordinary man of average prudence would not and could not reasonably be expected to act under tension with the same care, forethought and deliberation as ought to be expected of such a person when not acting under stress.

This is the rule clearly stated by the American Law Institute, Restatement, Torts § 470, upon which the plaintiff mistakenly relies, which reads: "The fact that the plaintiff is acting in an emergency not created by his own antecedent negligence is a factor to be taken into account,

in determining whether his conduct is free from contributory negligence." The court's charge to the jury in accordance with this rule is correct.

The plaintiff-appellant also objected to a portion of the charge in which the court told the jury that it could not find the plaintiff guilty of contributory negligence if it found that in using a defective, unsafe or inadequate gilson he was acting under the orders of his superior ". . . unless you find that his superiors did not know of the defective condition or in the exercise of reasonable care would not have known of the defective condition and you find that the plaintiff in the exercise of due care should have told his superiors about it."

In vacuo this instruction might, as the appellant contends, be misunderstood as informing the jury, contrary to the rule in *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 (1960), that a seaman is under some sort of duty to discover and report unseaworthy conditions on his vessel and for breach of that duty is barred from recovery. In its context, however, we do not think the instruction reasonably could or would have been so misunderstood, for before it was given the jury had been fully, carefully, accurately and without objection instructed as to the shipowner's duties under the Jones Act and the general maritime law. And the jury had also been told in accordance with *The Arizona* v. *Anelich*, 298 U.S. 110 (1936), and *Socony-Vacuum Oil Co.* v. *Smith*, 305 U.S. 424 (1939), that assumption of the risk that the vessel was unseaworthy or that its equipment and appliances were defective or unsafe or that its officers or crew members were negligent was not a defense. In its setting after these instructions and as part of full instructions that the plaintiff's own negligence, if any, did not bar him from recovery but, unlike domestic law, operated only to reduce the amount of his damages in proportion to the amount of negligence attributed to him.

we think the instruction complained of could only be understood as bearing on the issue of the plaintiff's care, that is to say, as telling the jury that it was to decide whether the plaintiff had used due care for his own safety when he knowingly and without complaint used a gilson he knew to be worn and frayed. So construed the charge is in accordance with the rule Judge Addison Brown applied in the case of a seaman who under orders knowingly used a defectively spliced rope which broke causing him to fall, when for all that appeared a sound line would have been supplied had the seaman asked the mate for one. *The Julia Fowler*, 49 Fed. 277 (D.C.S.D., N.Y., 1892), cited with approval in *Socony Vacuum Co. v. Smith*, supra at 432.

We turn now to the appellant's contentions with respect to the admission of evidence.

During cross-examination counsel for the defendant elicited from the plaintiff that someone had come to talk to him about the accident not long after it happened and wrote down what he had said. The plaintiff said that he had not read what the man wrote down but "only glanced at it," that it was not read to him and that he refused to sign it. He said that the reason he refused to read or sign what his visitor had written down was: "Because I didn't like the things he was putting down; he wasn't putting exactly as I was telling him," and "Every time he would ask me something and I would tell him, he would give it back to me and it was always different." Over objection counsel for the defendant cross-examined the plaintiff extensively to show variance between the plaintiff's testimony on the stand and the statements attributed to him by the writing.

Subsequently, as part of his case, counsel for the defendant put one of his employees named Cote on the stand who testified that he had interviewed the plaintiff after the accident and had written down what the plaintiff told

him but not in the plaintiff's exact words. This witness was allowed without objection to read the statement to the jury, but counsel for the plaintiff objected when the court admitted the statement into evidence as an exhibit. The record is not altogether clear but it would appear that the statement was admitted in evidence as a record of the witness's, Cote's, past recollection, he having testified that while he remembered interviewing the plaintiff he had no independent recollection of what the plaintiff had said. On this ground the statement is admissible in evidence as proof of what the plaintiff had said to Cote and hence to establish the foundation for its use on cross-examination of the plaintiff as a prior contradictory statement.

The same kind of a statement, but signed, given by a crew member who testified as a witness for the plaintiff was also admitted into evidence as an exhibit over objection by counsel for the plaintiff. It appears from the record that this statement was also used on cross-examination for the purpose of impeachment as a prior inconsistent statement of the witness and that as such the court admitted it into evidence as an exhibit in the exercise of discretion. When this exhibit was admitted and later generally in the charge, the court instructed the jury that, in judging the credibility of a witness and in evaluating his testimony in court, consideration might be given to prior contradictory statements of the witness, provided it found that the witness actually had made such statements, and then, in accordance with the orthodox rule, explicity cautioned the jury that " . . . any such prior statement is not evidence, but is to be considered by you solely for the purpose of determining whether what the witness is telling you in this courtroom is or is not the truth."

Aside from the use of the plaintiff's pre-trial statement as evidence of the witness Cote's past recollection, both exhibits under consideration constitute evidence that prior

statements were in fact made by the plaintiff and his witness and also evidence of what they then said. Thus the statements qualified for use for the purpose of impeaching the testimony of the plaintiff and his witness and under the charge that was the only use the jury might properly make of the exhibits. There was no error in admitting the statements into evidence as exhibits for the limited use permitted by the charge.

The plaintiff's complaint, however, is that regardless of the charge, of which he does not complain, the statements should not have been given to the jury to take to the jury room because, having the statements before them to read, the jurors were almost certain to give the facts stated therein substantive testimonial value. They were, of course, entitled to give the plaintiff's pre-trial statement testimonial value as an admission. The rule limiting the use of prior contradictory statements only for the purpose of impeachment, so far as it exists, relates to witnesses, not to parties. We are therefore concerned only with the statement of the plaintiff's witness and as to his statement the argument serves only to point up the artificiality of the orthodox rule given to the jury in the charge that prior contradictory statements of a witness have no substantive testimonial value but can be used only to contradict the witness's testimony in court, for it is indeed probable that as practical men and women jurors would almost inevitably, regardless of instruction to the contrary, act upon the assumption that what a witness may have said soon after an event is far more likely to be accurate than what the witness might subsequently say, even in court under oath. See *United States* v. *Corsi*, 65 F.2d 564, 565 (C.A. 2, 1933). Moreover, one can hardly expect jurors, however conscientious, to perform the mental gymnastic of distinguishing sharply between using a witness's prior

statement for testimonial purposes and using it only to contradict. The orthodox rule is not realistic.

Nor is the orthodox rule theoretically sound as pointed out by Dean Wigmore as long ago as 1923 in the Second Edition of his Treatise on the law of Evidence wherein, rejecting his earlier view, he wrote in Volume II, 1018:

> "(b) It does not follow, however, that Prior Self contradictions, when admitted, are to be treated as having no affirmative testimonial value, and that any such credit is to be strictly denied them in the mind of the tribunal. The only ground for doing so would be the Hearsay rule. But the theory of the Hearsay rule is that an extrajudicial statement is rejected because it was made out of Court by an absent person not subject to cross-examination (*post*, 1362). Here, however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the Hearsay rule has been already satisfied. Hence there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve."

In Dean Wigmore's view, now supported by Rule 63(1) of the Uniform Rules of Evidence, the statements would be admissible for their testimonial value and not merely admissible for impeachment and therefore the court's charge would be unduly favorable to the plaintiff.

A careful examination of the record shows that there was no abuse of discretion in the latitude allowed counsel for the defendant in his cross-examination of the plaintiff's witnesses.

Judgment will be entered affirming the judgment of the District Court.

Appendix D

MERCHANT MARINE ACT OF 1920 (JONES ACT) 46 U.S.C.A.

Section 688 provides as follows: Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.